

A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans

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I. INTRODUCTION

This essay is an expansion of a presentation that I made at the AALS Mini-Workshop on Tort Crisis and Tort Reform, in Los Angeles on January 3, 1987. The essay identifies uninsured motorist programs as its subject matter; it shows how only a fraction of uninsured motorist payments provide reimbursement for actual out-of-pocket losses; it criticizes uninsured motorist plans for their failure to concentrate on these losses; and it identifies three ways of reformulating uninsured motorist programs, one of which it rejects but two of which it alternatively endorses. The remainder of this Introduction is devoted to explaining how it happened that I selected uninsured motorist plans as the topic for my presentation.

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The entire question of tort reform turns out to pose a real and vexatious problem for a person like myself—a person who defines himself not as a law reformer, but rather as a scholar who happens to work on projects within the field of torts. My sense of vexation came to the fore this spring when Proposition 51 was on the ballot in California. (The thrust of 51 was to retain the rule of joint-and-several-liability for the plaintiff's economic losses but to abandon the rule in its application to pain and suffering damages.)¹ During the elaborate multi-million-dollar campaign on Proposition 51, both colleagues at school and neighbors at home began asking me whether tort law's pain-and-suffering awards have indeed become too large; the response that I, as impartial academic,² was inclined to give was that the various scholars who have considered this question have come to different conclusions, depending on the specific philosophy of tort to which they adhere.³ This response, however, was one that my colleagues found not altogether satisfactory, and that my neighbors regarded as essentially worthless. Similarly, when asked by colleagues and neighbors about the actual extent to which tort liability rules achieve deterrence, and what the loss of deterrence would be if the extent of liability were reduced by (say) twenty to forty percent in suits against local governments, my perplexed and unhelpful response was that I could not tell, since I know of only a limited number of studies of actual

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1. The proposition was voted in by a wide margin; it is now codified as CAL. CIVIL CODE § 1431.2 (West Supp. 1987).

2. For a partial explanation of my impartiality, see note 6, *infra*.

3. Patricia Danzon, for example, examines pain-and-suffering awards from the perspective of the economics of insurance and finds them too large; in light of the economics of deterrence, however, she recommends that (reduced) tort awards be supplemented by uninsurable fines imposed on the tortfeasor. P. DANZON, *MEDICAL MALPRACTICE* 151-73 (1985). It is not possible to ascertain from her text what her position would be if a legislature were considering a pain-and-suffering cap *without* any system of fines in the same package.

deterrent effects in all of tort law,⁴ not one of which bears on the extent of deterrence when tort rules are applied to public agencies.

My situation of vexation in the face of problems of tort reform influenced my attitude when I was first invited by the AALS Planning Committee to make a reform proposal at this session.⁵ As I pondered the invitation, what I decided was that I would be willing to select and advance a proposal *even if* its actual substantive importance could be disparaged as modest, *so long as* the proposal clearly satisfied a number of conditions. The first of these conditions was that the proposal should be original. Secondly, the proposal should be interesting to think about. Third, the issues it raises should be at least germane to the issues at stake in the current tort reform debate. Finally, the proposal should be consistent with a variety of tort philosophies in a way that would *both* allow the proposal to appeal to a broad audience of tort scholars *and* relieve me of any obligation to commit myself, in my own short presentation, to any one of these philosophies.⁶

Having developed these criteria, I initiated the search for a specific reform proposal. In the course of this search, I became impressed with the idea that issues of tort liability standards have tended to be overworked and overdiscussed in contemporary tort scholarship; in light of this, I thought, it might be difficult to locate a purely doctrinal idea that could be both valuable and original. On the other hand, my sense was that issues relating to insurance—and the conjunction of insurance and tort liability rules—have been badly underdeveloped in the tort literature.⁷ Accordingly, there was a greater possibility of coming up with an insurance-related proposal that might comply with my conditions of value and originality.

In further reviewing the range of insurance practices that bear on the tort system, I began to pay attention to uninsured motorist plans. While these are plans that are in effect, by statute, in almost every state,⁸ they have been generally neglected by legal academics. From what I can tell, uninsured motorist plans go largely undiscussed in torts classrooms: noteworthy here is one leading coursebook, which, despite its stated general interest in "tort and accident law," allocates exactly one paragraph to uninsured motorist.⁹ In a similar fashion, the format of the leading insurance coursebooks suggests that underinsured motorist plans do not receive extensive discussion in law school insurance courses.¹⁰ If uninsured motorist issues have

4. The studies are reviewed, from a perspective that may be too skeptical, in Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 586-90 (1985).

5. To clarify: I myself served on this Committee—but was invited to make *this* presentation by the Committee's other two members.

6. In my own scholarship, I have displayed strong interest in several of these philosophies, but have wholly affiliated myself with no one of them.

7. The beginning of a new surge of interest in insurance among tort scholars can be found in K. ABRAHAM, *DISTRIBUTING RISK* (1986).

8. See *infra* text accompanying note 28.

9. See P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, *TORT AND ACCIDENT LAW* 889 (1983).

10. See R. KEETON, *BASIC INSURANCE LAW* 115-20, 259-65 (2d ed. 1977); W. YOUNG & H. HOLMES, *INSURANCE* 401-404 (2d ed. 1985).

The response to my AALS presentation led me to realize that the law professors who know uninsured motorist plans best are those teaching *conflicts*—since several leading choice-of-law cases have concerned uninsured motorist insurance. See, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981).

evidently been overlooked by torts and insurance *teachers*, in general they have likewise been neglected by torts and insurance *scholars*. While there is a useful treatise by Professor Widiss, now in its second edition,¹¹ in the years since 1970 there has not been a single article on uninsured motorist in any of the major law reviews; for that matter, those law reviews have yielded only two such articles in the entire thirty year history of uninsured motorist plans.¹² Two of the major characteristics of uninsured motorist plans that are dwelled on below have been barely mentioned in the scholarly literature; accordingly, my critical diagnosis of existing uninsured motorist plans is almost entirely novel.¹³

II. THE CIRCUMSTANCES OF UNINSURED MOTORISTS

Before considering uninsured motorist programs, one needs to know the facts about the social and legal situation of motorists who drive without insurance. A background point is that by the early twentieth century American courts had banished earlier doubts and confirmed that contracts providing insurance against tort liability were valid and legally enforceable.¹⁴ As soon as private automobiles started to become common in the 1920's, private insurance companies began offering liability insurance policies to motorists. During this era of wholly voluntary liability insurance, only thirty to forty percent of all motorists elected to make the liability insurance purchase.¹⁵ Moreover, many of the motorists who were without insurance were also without assets that could be relied on to pay off a tort liability judgment. By the late 1930's, state legislatures had become concerned about the extent to which the victims of negligent motorists were without viable compensation claims. Responding to this concern, the legislatures in a handful of states adopted statutes directly compelling the purchase of auto liability insurance.¹⁶ Far more popular among the states were "financial responsibility" statutes; these statutes impose on motorists a requirement of insurance (or proof of solvency) only after the individual motorist is involved in an actual accident producing significant harm.¹⁷ In recent years, a significant number of states have moved away from financial responsibility in the direction of compulsory insurance—a move often undertaken in conjunction with the adoption of auto no-fault plans.¹⁸

Over time, the enforcement of this variety of insurance requirements has reduced but not eliminated the phenomenon of uninsured motorists. In states with compulsory

11. A. WIDISS, *UNINSURED AND UNDERINSURED MOTORIST INSURANCE* (2d ed. 1987) [hereinafter A. WIDISS]. This essay will demonstrate the usefulness of the treatise by citing it frequently. For California, see P. EISLER, *CALIFORNIA UNINSURED MOTORIST LAW* (4th ed. 1986).

12. Laufer, *Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement*, 1969 DUKE L.J. 227 (1967); Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 N.W. U.L. REV. 497 (1967). I rely here on the bibliography in 1 A. WIDISS, *supra* note 11, Appendix C 131-35, and on a "top 15" notion of "major law reviews;" my concept of "article" does not include student comments.

13. But see *infra* note 47.

14. W. PROSSER & P. KEETON, *TORTS* 585-86 (5th ed. 1984).

15. See Wagner, *Safety Responsibility Laws—A Review of Recent Developments*, 9 GA. B.J. 160, 168 (1946).

16. Until 1956, Massachusetts was the only state with compulsory insurance; New York and North Carolina joined the ranks in 1956 and 1957 respectively. See 1 A. WIDISS, *supra* note 11, at 5 & n.6.

17. On the variety of financial responsibility plans, see *id.* at 4-7.

18. See *id.* at 17, 59.

insurance, the number of noncomplying motorists is at least one percent.¹⁹ In some financial responsibility states (such as Illinois) the number of uninsured motorists can rise as high as twenty percent.²⁰ Nationwide, the number of uninsured motorists is estimated to be in the vicinity of eight percent.²¹ Moreover, for various demographic and psychological reasons, those motorists who are without insurance end up being involved in a disproportionately large number of auto accidents.²² Accordingly, the percentage of potential tort claims that can be frustrated by the motorist's lack of insurance may well be significantly greater than the percentage of motorists who are themselves without insurance. Given the combination of compulsory insurance in some states and a range of financial responsibility requirements in others, I will hereinafter refer to auto liability insurance as "required or semi-required" by law. An important further point is that the insurance policy that the motorist *is* required or semi-required to buy is only for a limited amount: in a number of states, the statute calls for 15/30 coverage (that is, \$15,000 per claim and \$30,000 per occurrence).²³

In any event, the explosion in auto sales in the years following the Second World War led to a new round of legislative reviews of the entire question of auto insurance.²⁴ Once again, the alternative of compulsory insurance was given serious consideration; likewise, states assessed the possibility of state-sponsored unsatisfied judgment funds, which could be financed by levies on all motorists.²⁵ In 1955, certain auto insurance companies—in an evident effort to stave off the adoption by states of either compulsory insurance or unsatisfied judgment measures—began to offer uninsured motorist coverage in their own auto policies.²⁶ Two years later, New Hampshire responded to this insurance company initiative by requiring the inclusion of such coverage in auto policies.²⁷ By now, there are forty-nine states with uninsured motorist statutes on their books.²⁸ In seventeen states uninsured motorist coverage is mandatory in every insurance policy.²⁹ In the remaining thirty-two states, insurance companies are obliged to offer this coverage, but the purchasers of insurance are given the option of rejecting it.³⁰ In most of these states, any such rejection must be expressed in writing, often on a form approved by the state insurance commissioner.³¹ Moreover, state courts have nurtured the idea that any rejection of uninsured motorist coverage by the motorist must be "knowing and deliberate."³² Hence, the insurance company is required to make an extra effort in order to make sure that the

19. See *id.* at xv.

20. See *id.* at 16, n.52.

21. See *id.* at 15.

22. See *id.* at 16; W. PROSSER & P. KEETON, *supra* note 14, at 597.

23. National information is presented in U.S. Department of Transportation, *Compensating Auto Accident Victims* 25-64 (1985).

24. See 1 A. WIDISS, *supra* note 11, at 9-10.

25. See *id.* at 8.

26. See *id.* at 10-13.

27. See *id.* at 13-14.

28. See *id.* at 21. The exception is Michigan, where there are special circumstances. See *infra* note 107 and accompanying text.

29. See 1 A. WIDISS, *supra* note 11, at 29, n. 19.

30. See *id.* at 29-35.

31. See *id.* at 30.

32. *Grimes v. Elite Ins. Co.*, 82 Cal. App. 3d 130, 137, 146 Cal. Rptr. 808, 811 (1978).

motorist understands what he is doing. As I myself found out a few months ago, in California any applicant for auto insurance who wants to turn down uninsured motorist coverage is subjected to a number of delays and burdens before he is allowed to exercise his preference.

Given these characteristics of various uninsured motorist statutes, I will hereinafter refer to uninsured motorist as coverage that state law "requires or strongly encourages." Uninsured motorist plans are designed, of course, to protect against the risk of motorists who are without that insurance which state law requires or semi-requires. Accordingly, uninsured motorist coverage itself generally contains policy limits that are equal to the amount set in the state's auto liability insurance statute.³³ Thus, in a 15/30 financial responsibility state, 15/30 is the amount of uninsured motorist coverage that state law will require or strongly encourage.³⁴

Even in states in which uninsured motorist coverage is only strongly encouraged, it evidently is widely purchased. Ninety-one and ninety-nine percent are the figures that have been cited for Nebraska and North Carolina;³⁵ one leading insurance carrier has advised me that in Los Angeles County ninety-four percent of its customers accept uninsured motorist.³⁶ The low rate of rejection that is implicit in these acceptance figures is undoubtedly due, in part, to the burdens that state law imposes on both the insurer and the insured if a rejection of uninsured motorist coverage is being considered. Doubtless, it is likewise due to the fact that the threat of being injured by an uninsured motorist is a threat that most insureds seem to regard as especially "available"³⁷ or credible. (The reader is here invited to fill in his own stereotype of the motorist who drives without insurance.)³⁸

In order to convey some sense of the monetary burden that drivers bear in accepting uninsured motorist coverage, I here set forth quotations that I have recently received from four insurance companies for my own auto insurance. Both bodily injury liability and uninsured motorist coverage are for the 15/30 legal minimum; property damage liability is for the \$10,000 minimum amount that insurers are willing to offer.

	Bodily Injury Liability	Property Damage Liability	Uninsured Motorist Coverage
Company A	\$ 292	\$ 136	\$ 82
Company B	\$ 410	\$ 159	\$ 117
Company C	\$ 220	\$ 82	\$ 48
Company D	\$ 398	\$ 162	\$ 58

A review of these quotations shows that the price of uninsured motorist insurance—at least for a person who is in my situation—ranges from fifteen to twenty-eight

33. See 1 A. WISS, *supra* note 11, at 379.

34. See the chart in 1 A. WISS, *supra* note 11, Appendix B 128-29.

35. See O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 79 n.52 (1986).

36. I have promised institutional anonymity to all the insurance officials with whom I have spoken in preparing this essay.

37. See Tversky & Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127-28 (1974).

38. Keep in mind that many teenagers are insured through their parents.

percent of the price of bodily injury coverage and from thirty-six to seventy-three percent of the price of property damage coverage. In interpreting my own situation, the following factors should be taken into account. First, California is an extremely high-cost liability state; also, it is a financial responsibility jurisdiction with a large number of uninsured motorists. The fact that I have had a clean driving record in recent years serves to reduce my liability premium; yet since uninsured motorist claims result from accidents that are largely imposed by external circumstances upon an innocent victim,³⁹ insurance companies do not concern themselves with the individual's driving record in determining his uninsured motorist premium. Thirdly, there *are* variations from area to area in the number of uninsured motorists—or more precisely, the number of accidents resulting from the negligence of uninsured motorists. In light of this, uninsured motorist premiums are subjected to a process of territorial rating. Within California, I am told, the premium in territories with the worst claims record is at least twice the premium in the territory with the best record. While my own "territory" is inhabited by relatively affluent motorists most of whom have insurance, we are adjacent to the Venice-Ocean-Park territory, in which a lack of insurance is more common; as a result of this, the premium for uninsured motorist in my own territory is somewhere in the middle range. Meanwhile, in South-Central Los Angeles, there are low-income neighborhoods in which as many as seventy percent of all motorists may be without insurance.⁴⁰ Uninsured motorist coverage is hence quite expensive within these insurance territories; yet in these locations the discretionary or disposable income available to insurance buyers is obviously at its lowest levels. One is therefore not surprised to find that in South-Central Los Angeles, the acceptance rate for uninsured motorist can get as low as eighty-one percent. Yet eighty-one percent remains quite a high figure; so long as the purchase of uninsured motorist coverage remains anywhere within the eighty-one to ninety-nine percent range, it is obviously appropriate to say that uninsured motorist coverage is very widespread.

III. THE PROBLEM WITH UNINSURED MOTORIST PROGRAM

To recap: under the compulsion or pressure of state law, uninsured motorist coverage is extensively purchased; moreover, its purchase price in many jurisdictions cannot be regarded as trivial. There is reason, therefore, to enquire into the elements of this insurance coverage. What uninsured motorist insurance entails is an extremely interesting combination. The language conventionally employed in an uninsured motorist policy specifies that "the [insurance] company will pay all sums which the insured . . . shall be legally entitled to recover as damages . . . because of bodily

39. As of 1970, the motorist whose injury was concurrently caused by his own negligence was barred from recovering in tort—and hence under uninsured motorist insurance—by his own contributory negligence. Given the switch from traditional contributory negligence to comparative negligence, this motorist is presumably now entitled to a partial recovery from his own uninsured motorist carrier. See 1 A. WIDISS, *supra* note 11, at 199–200 (describing uncertainties in the case law).

40. See L.A. Times, Nov. 23, 1986, at 1, col. 1.

injury sustained by the insured, caused by [the use of an] uninsured highway vehicle”⁴¹ The rights to recover under the policy are thus defined by the ordinary rules of tort liability for personal injury; these rights are asserted, however, not against the tortfeasor herself, but rather against the insured’s own insurance carrier. To repeat, within uninsured motorist insurance, third-party liability rights are implemented through a first-party insurance mechanism.

This is an arrangement that produces a number of certainly noteworthy results. First, consider the victim of a negligent but uninsured motorist who incurs medical bills on account of his accident—medical bills, however, that he is reimbursed for by a health insurance policy that he holds through his job. In light of the collateral source rule that prevails in tort claims, in any tort suit brought by the victim against the negligent motorist, the victim would be able to recover in full without any reduction that might take into account the payments from the collateral source. If the negligent motorist is uninsured, the victim then claims against his own insurance carrier. And because of the way in which the rights that are enforced by uninsured motorist plans are originally defined by tort liability rules, the victim in this claim against his own insurance company can likewise recover for all his medical bills, with no attention paid to the fact of their reimbursement by his own health insurer. Indeed, that the collateral source rule “applies” to uninsured motorist claims is a point that is so obvious that one can find it confirmed only by indirection in uninsured motorist treatises.⁴² Its obviousness results, of course, from the “pay all sums” language in the uninsured motorist policy.⁴³ That language is taken so seriously as to allow a victim, at least in some jurisdictions, to secure a double recovery for his medical bills from his *own* insurance company: once from the “medical payments” provision of his insurance policy, and then all over again through the uninsured motorist portion of that policy.⁴⁴

Secondly: if a person is injured by a negligent motorist, in his suit against that motorist a large portion of the victim’s eventual tort recovery will typically be for pain and suffering. If the motorist is uninsured, that pain-and-suffering claim is now asserted by the victim against his own first-party insurer.⁴⁵ Insurance companies in California with whom I have spoken indicate that something like sixty-five percent of all payouts for uninsured motorist claims are in fact attributable to victims’ pain and suffering. To be sure, this figure is no more than a ballpark estimate; in the eyes of insurance companies, pain-and-suffering payments are so obviously a part of their uninsured motorist obligations that no bookkeeping effort is made to segregate them or keep track of their amount.

Thirdly: if the victim is struck by a motorist whose behavior is sufficiently obnoxious—for example, a motorist who is driving while intoxicated—the victim in

41. See I A. WIDISS, *supra* note 11, at Appendix A 14 (reproducing 1966 form of National Bureau of Casualty Underwriters). But see the somewhat different language in *id.* at Appendix A 8 (form of Insurance Services Office).

42. See, e.g., *id.* at 435–60 (discussing a specified list of “limits” on uninsured motorist coverage).

43. See *supra* note 41 and accompanying text.

44. See I A. WIDISS, *supra* note 11, at 436–45. WIDISS approves this result: the motorist, having paid two premiums, has the right to receive two recoveries. *Id.* at 445.

45. See P. EISLER, *supra* note 11, at 1–40.

his suit against that motorist has a claim for punitive damages.⁴⁶ If the driver is not only drunk but also uninsured, the victim asserts his tort claim against his own insurance company. Because punitive damages are a portion of the "all sums" to which the victim would be "legally entitled to recover as damages" in tort, in a majority of the jurisdictions that have considered the question the victim can secure a punitive damage payment from his own first-party insurer.⁴⁷

As my earlier language indicated, these various results are extremely interesting. At the same time they are exceedingly odd. The collateral source rule may well make very good sense in ordinary tort contexts. As a matter of fairness, it is certainly arguable that the liability of a wrongdoer for the harm that he has caused should not be diminished by the insurance coverage that the victim has secured, in a costly way, for his own protection. Moreover, for purposes of deterrence, the full harm that a victim is likely to suffer is the harm that a potential defendant should be required to reckon with as he considers his own behavior.⁴⁸ That strong arguments such as these are available to provide support for the collateral source rule in its ordinary tort applications makes me suspicious of recent legislative efforts to modify or abrogate the rule in these applications.⁴⁹ Uninsured motorist, however, is indisputably a form of first-party insurance. When people express an interest in buying first-party insurance, their goal generally is to protect themselves against the incurring of real losses; they have no reason to pay money for insurance protection that merely duplicates the protection which they have already secured for themselves by way of preexisting insurance policies. Accordingly, to find the collateral source rule in effect within the framework of first-party insurance is just about bizarre.

A somewhat similar analysis can be extended to the issue of pain-and-suffering damages. Large awards for pain and suffering may well be very appropriate in ordinary tort settings. If a wrongdoer subjects his victim to substantial pain and suffering, then as a matter of fairness the wrongdoer should be liable to that victim for a significant amount. Moreover, from the perspective of deterrence the risk of pain and suffering is a large part of the risk of dangerous conduct; if the potential tortfeasor is to be confronted with the full risk that his dangerous conduct occasions, then the threat of large pain-and-suffering awards is an important feature of a deterrence strategy. These valid arguments on behalf of pain-and-suffering damages cause me to question the variously drafted "caps" that state legislatures have recently imposed upon pain-and-suffering awards.⁵⁰ These arguments favoring pain and suffering are undermined, however, by the shift from a third-party tort claim to a first-party uninsured motorist claim. As a general matter, in buying first-party insurance people are endeavoring to protect themselves against out-of-pocket losses. Private insurance companies, though presumably interested in supplying those forms

46. See *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

47. See the holding and the cases cited in *Stewart v. State Farm Mutual Auto. Ins. Co.*, 104 N.M. 744, 726 P.2d 1374 (1986). Professor Widiss opposes this majority result, on grounds that punitive damages are not compensation. 1 A. WIDISS, *supra* note 11, at 380-81.

48. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 186 (3d ed. 1986).

49. See, e.g., ALASKA STAT. § 09.17.070 (Cum. Supp. 1986).

50. See, e.g., MARYLAND CTS. & JUD. PROC. CODE ANN. § 11-108 (Cum. Supp. 1986) (\$350,000).

of insurance that consumers would find attractive, do not see fit even to market or make available general insurance coverage for pain and suffering.⁵¹ This concern for monetary losses in the purchase of insurance can be explained in a variety of ways. First-party insurance enables its purchaser to shift costs from a time in his life when money is worth relatively less to a time when money is worth relatively more. Money is worth more when an injured person faces staggering medical bills as a result of an injury; yet the mere fact that an individual is undergoing pain and suffering obviously does not drive up the value of money for that individual. (Indeed, it may even drive it down.)⁵² A related evaluation is that first-party insurance takes advantage of the technique of interpersonal loss spreading, which itself relies on the notion of the diminishing utility of money.⁵³ Yet the concept of loss spreading relates to the spreading of actual monetary losses—and not to elements of intangible harm such as pain and suffering, which, as a matter of literal fact, cannot be transferred or spread at all; rather, the pain necessarily remains on the victim himself, who at best can secure quite imperfect consolation from the receipt of even a substantial monetary award.⁵⁴ In this regard, it is noteworthy that public programs such as workers' compensation and Social Security disability insurance, which find their bases in the social policies of loss spreading and victim compensation, deliberately make no effort to reimburse for pain and suffering. In all, several lines of analysis converge to bear out the point that for purposes of first-party insurance, the coverage of pain and suffering is generally unwise.⁵⁵ Yet despite this point, uninsured motorist plans require or strongly encourage motorists to buy insurance that primarily covers them against the risk of incurring pain and suffering.

As far as punitive damages are concerned, there are intriguing arguments that can be and have been advanced in their support—arguments concerned with the objectives of both punishment and deterrence.⁵⁶ These arguments, to be sure, are properly controversial; within the law journals a splendid debate has recently been unfolding.⁵⁷ Still, to recognize the propriety of this controversy is to acknowledge that the arguments favoring the imposition of punitive damages do at least satisfy minimum conditions of plausibility. These arguments give up their plausibility, however, when one shifts from the tort setting to the environment of uninsured motorist coverage. Here, the majority rule permits the victim to recover punitive

51. There may be elements of pain and suffering in policies that pay a predetermined amount if the insured suffers a specified disability or dismemberment. Such policies are no longer common, however.

52. See Friedman, *What is "Fair Compensation" for Death or Injury?*, 2 *INT'L REV. L. & ECON.* 81 (1982); see also Professor Priest's article elsewhere in this symposium.

53. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 39–50 (1970).

54. Assume that 100 people each have \$10,000 of wealth and that one of them then suffers a monetary loss of \$8,000. Spreading the loss by having each of the 100 pay \$80 is a practice that finds support in the principle of the diminishing utility of money. Assume now that the victim incurs only pain and suffering, which tort law values at \$8,000. The diminishing-utility-of-money principle would oppose taxing the remaining persons \$80 apiece in order to provide the victim with an \$8,000 award to add to his original \$10,000 endowment.

55. Considerations of adverse selection may also help explain the absence of first-party insurance for pain and suffering. Professor O'Connell quotes an insurance company official as saying "No one wants to buy pain-and-suffering insurance. But if some people did want to buy it, we would be unwilling to sell it to them."

56. See *Symposium: Punitive Damages*, 56 *S. CAL. L. REV.* 1 (1982).

57. A valuable manuscript, currently in circulation, is Jason Johnston, *The General Efficiency of Punitive Damages* (December 1986).

damages from his own insurance company—even though this company has itself been free of wrongdoing⁵⁸ and even though the company will predictably pass on to its insureds, by way of higher premiums, the added costs that it bears on account of its punitive damage exposure.

Most bizarre of all is the situation in Virginia. Virginia has joined the majority position, allowing the recovery of punitive damages in an uninsured motorist claim.⁵⁹ Yet Virginia is apparently one of those jurisdictions that disallows, on grounds of public policy, any coverage of punitive damages in a liability insurance policy.⁶⁰ In Virginia, therefore, if a person is injured by the drunk driving of a motorist who has purchased a liability insurance policy, the victim is not able to reach that policy in attempting to sue the motorist for punitive damages; notwithstanding this, the victim of an uninsured motorist who is guilty of drunk driving has a successful punitive damage claim against his own first-party insurer.⁶¹

To be sure, in the auto accident setting, punitive damage claims are currently available only in a small percentage of all cases. As a practical matter, therefore, my observations concerning punitive damages and uninsured motorist coverage are much less important than my observations about the collateral source rule and pain and suffering. Those latter sets of observations are, however, of major importance. It can here be assumed that fifty-five percent of current uninsured motorist payouts are attributable to pain and suffering.⁶² Of the remaining forty-five percent for medical bills and income losses, it seems safe to assume that one-third of these are covered by collateral sources.⁶³ These assumptions, taken in combination, support the appraisal that of all payments under uninsured motorist insurance, only something like thirty percent actually reimburse the victim for net out-of-pocket losses. To a remarkable seventy-percent extent, then, uninsured motorist coverage performs functions that seem unrelated to what may be the motorist's real insurance needs.

IV. REFORMULATING UNINSURED MOTORIST PLANS

Having characterized above a number of the elements of uninsured motorist programs, this essay can now explain the reform or reforms that I want to recommend. But before undertaking the explanation, I should make clear what the understanding is of uninsured motorist plans that these proposed reforms presuppose. These plans can be (partially) interpreted as containing a recommendation running

58. Not considered here is the insured's claim for punitive damages against his own insurance company when that company is guilty of bad faith in its processing of a claim. See 2 A. WEISS, *supra* note 11, at 105-38.

59. See *Lipscombe v. Sec. Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972).

60. See *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962) (endeavoring to apply Virginia law).

61. There are other such oddities in uninsured motorist law. Consider the motorist whose negligence results in an injury to a member of his own household. Given the household-member exclusion that is typical in auto liability policies, if the motorist does have insurance, his insurance policy would not be available to the victim. Yet if the motorist is lacking in insurance, the victim is allowed to recover from his own uninsured motorist carrier. See *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1 (Fla. 1972).

62. This is a compromise between the 65 percent figure mentioned earlier in the text and the 50 percent figure suggested by P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, *supra* note 9, at 891.

63. See *id.* A higher figure is suggested by the test cases studied in HAMILTON, RABINOVITZ & ALSCHULER, CLAIM EVALUATION PROJECT: NATIONAL OVERVIEW (1987).

from government to the driver that the driver purchase uninsured motorist coverage. This interpretation sets up a rather obvious criterion for evaluation: *if* the government intends to recommend the purchase of insurance, the insurance package in question should be one that is sound and sensible.

Of course, uninsured motorist plans generally go beyond mere recommendation: they typically entail some process of compelling or at least pressuring the car owner to purchase insurance. To consider the appropriateness of this, it is useful to step back and gain some perspective. Public programs that would assure the compensation of accident victims have been extensively discussed in recent years. These programs can be rendered appealing either by economic notions of loss spreading or by a sense of social compassion in the face of serious injury. Responding to these elements of appeal, a large number of leading tort scholars—including Abel,⁶⁴ Calabresi,⁶⁵ Fleming,⁶⁶ Franklin,⁶⁷ Harris,⁶⁸ Roger Henderson,⁶⁹ Robert Keeton,⁷⁰ O'Connell,⁷¹ Pierce,⁷² Sugarman,⁷³ and Ursin⁷⁴—have indicated their support or at least their keen interest in compensation programs. With workers' injuries in this country already covered by workers' compensation, highway accidents comprise the major category of personal injuries for which compensation might be lacking. That the negligent motorist is without assets and without liability insurance is a significant reason why many auto accident victims might end up without compensation. It is expectable, therefore, that scholars and policymakers who subscribe to the social policy of victim compensation would strongly favor the retention of some version of an uninsured motorist program.⁷⁵

To be sure, there are a range of objections that can be directed at various victim-compensation proposals by those who might oppose their adoption; certainly, it is worthwhile to see how uninsured motorist plans bear up when confronted with these objections. An initial point is that many compensation programs bestow large awards on persons who have brought about their own injuries by their own risky or careless conduct. From a *practical* perspective, to provide an open offer of compensation to the victims of such injuries might unwittingly increase the incidence of careless conduct.⁷⁶ From a *moral* perspective, the person injured solely by his own

64. Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199 (1981).

65. See G. CALABRESI, *supra* note 53, at 39–64 (endorsing loss spreading as a major goal of accident law).

66. See Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193 (1984).

67. See Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

68. See D. HARRIS, ET AL., *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* (1984).

69. See Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries?*, 48 TEX. L. REV. 117 (1969).

70. See R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC ACCIDENT VICTIM* (1965).

71. See *id.* and just about all of O'Connell's later writings, including his entry in this symposium.

72. See Pierce, *Encouraging Safety, The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

73. See Sugarman, *supra* note 4.

74. See Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975) (endorsing loss spreading as a major goal of accident law).

75. Note, however, that Sugarman seems to oppose "tailored" compensation plans, on grounds that they might detract from a more comprehensive solution. See Sugarman, *supra* note 4, at 622–41.

76. T. SCHELLING, *CHOICE AND CONSEQUENCE* 7–8 (1984).

carelessness is not the kind of innocent victim who most clearly inspires our social compassion.⁷⁷ Assuming, then, that the variable of victim conduct is one that matters significantly in the appraisal of compensation programs, it is noteworthy that uninsured motorist plans handle this variable with relative ease. For under those plans, a victim can secure compensation only to the extent that his injury is due to the negligence of some other motorist⁷⁸—a motorist, moreover, who is not only negligent, but also irresponsible enough to be driving without insurance. (Both the negligence of that motorist and his lack of insurance are factors that are essentially beyond the victim's control.)⁷⁹

A second objection to compensation programs builds on the point that many such programs would effect a subordination or abrogation of the regime of tort liability. Yet in the view of many, there are fairness values or deterrence advantages that inhere in a tort regime, values and advantages that should not be abandoned.⁸⁰ But whatever the ultimate merit of this objection, it does not place any serious cloud on uninsured motorist plans. A preliminary point is that as far as auto accidents are concerned, public policy has supplemented tort liability rules with a legal requirement (or semi-requirement) that motorists purchase liability insurance; the immunity from individual responsibility that auto insurance entails may well diminish whatever benefits tort law might otherwise occasion. Yet, in any event: because of a feature in uninsured motorist plans that has not been mentioned until now, these plans avoid any element of tort subordination. That feature is subrogation. Admittedly, most motorists who are without insurance are also without assets; in these typical circumstances, the burden of liability remains on the shoulders of the uninsured motorist carrier. In some instances, however, the negligent motorist may have assets that could be reached. Even so, the victim, seeking the most convenient source of compensation, will probably be inclined to collect from his own insurance company rather than bringing suit against the negligent motorist. However, the uninsured motorist carrier, having paid out this claim, can then proceed by way of subrogation against the negligent motorist—thereby enforcing against that motorist the original tort claim.⁸¹ (The statutory rule of subrogation in uninsured motorist coverage takes precedence over the common law doctrine prohibiting the transfer, by way of either subrogation or assignment, of personal injury claims.)⁸² In this way, uninsured motorist plans avoid any reduction in the effective liability to which the negligent

77. See *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (no duty to rescue when the victim's situation of peril is due to his own voluntary and unreasonable conduct).

78. On comparative negligence, see *supra* note 39.

79. Traditional doctrines of tort liability might be interpreted as signifying that the victim of negligent motoring is deserving of or entitled to a full tort recovery. The frustration of this entitlement by the motorist's lack of insurance could then possibly be relied on to justify a full tort award for the victim within an uninsured motorist program. Any such effort at justification would presuppose, however, a program funded by general state revenues. So long as uninsured motorist coverage relies on first-party insurance, the first-party financing mechanism provides an essential framework for appraising what the appropriate elements are of uninsured motorist coverage.

80. See, e.g., Henderson, *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981).

81. See 1 A. WIDISS, *supra* note 11, at 44-45.

82. See *id.* at 44.

motorist is subject; whatever virtues may be associated with a regime of individual liability are hence retained by uninsured motorist programs.

A third objection to compensation programs is their cost. Almost by their very nature, such programs are expensive. When supported by public funds, they can generate concern about levels of taxation, the size of the deficit, and the priorities among many programs that themselves make claims upon the public fisc. All of these concerns, however, are in a way irrelevant to uninsured motorist programs: for these programs receive their revenues directly from motorists—motorists who, in turn, are the beneficiaries of the programs' outlays.

This appraisal, however, serves to draw attention to another objection: the compulsory or quasi-compulsory character of uninsured motorist insurance. After all, the purchase of that insurance could be left to private insurance markets—markets that were, in fact, developing in the mid-1950's, before legislatures intervened by way of making uninsured motorist coverage at least somewhat compulsory.⁸³ The standard Calabresian rationale for mandatory accident insurance is that individuals, if left to their own psychological devices, will predictably do an inadequate job of purchasing that insurance which does in fact promote their own best interests.⁸⁴ This rationale will be contested, of course, by more traditional economists;⁸⁵ yet it may be appealing enough for most of us. Observe, however, that the rationale contains an obvious built-in limitation: the rationale cannot be invoked unless the insurance that individuals are obligated to buy *is* in fact insurance that does promote the best interests of at least most individuals.⁸⁶

This essay has already referred to the conventional economists who would oppose the compulsory features of uninsured motorist insurance; let me now return to their situation, in order to further consider their position. Despite their opposition, these economists might well acknowledge that uninsured motorist programs are unlikely to be repealed, both because they have been a stable part of American law for thirty years and because their repeal would be vigorously opposed by a broad range of policymakers and scholars.⁸⁷ Faced with the reality of uninsured motorist coverage as part of the status quo, these economists would at least express a preference for a program that provides insurance that makes basic economic sense—insurance that intelligent motorists would be inclined to buy were they given the unconstrained option of doing so.

To summarize, then, uninsured motorist programs can be evaluated as entailing a government recommendation, or instead as resting on elements of government compulsion. Insofar as the programs include compulsion, they can be evaluated from the perspective of those who regard that compulsion as appropriate, and also from the perspective of those who find it unwarranted yet who acknowledge that uninsured motorist programs can be expected to persevere. What is notable about all of these

83. See *supra* text accompanying note 26.

84. See G. CALABRESI, *supra* note 53, at 55–58.

85. See, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 257–58 (1987).

86. For a suggestion, moreover, that motorists may, if anything, overestimate the chances of being injured by an uninsured motorist (and hence overestimate the need for insurance), see *supra* text accompanying note 37.

87. For an indication of the durability of uninsured motorist coverage, see *infra* text accompanying note 107.

evaluations and perspectives is that they converge on one basic point: the insurance that the program includes should entail a sensible and intelligent insurance package. This expression turns out, however, to set forth a test that current uninsured motorist programs badly fail: for these programs lavish their attention on elements of detriment other than net economic loss—elements for which insurance coverage seems inappropriate. Accordingly, the first portion of my recommendation is this: even if the existence of uninsured motorist plans is accepted as a given, the coverage of these plans should be contracted so that they apply only to net out-of-pocket losses—those losses with respect to which the social ethic in favor of insurance can plausibly be regarded as compelling.

Before proceeding further, this essay should refer to two possible problems that can be foreseen with respect to an uninsured motorist program that zeroes in on net out-of-pocket losses. First, if first-party insurers were to charge motorists a premium that was constant except to the extent that it takes the motorist's territory into account, then "high" collateral-source insureds would end up subsidizing "low" collateral-source insureds, in light of the way in which payments from collateral sources would now serve to diminish recoveries. However, under the proposed reformulation, with its emphasis on net losses, it can be expected that uninsured motorist insurers would inquire of their applicants about the extent of the latter's principal collateral sources, and would then set their premiums in a way that would take those collateral sources into account. This would avoid the cross-subsidy that I would regard as unfortunate. Secondly, if uninsured motorist carriers were to charge a flat premium to all in the territory, there would be a prospect of a subsidy running from low-income insureds to high-income insureds: this is a subsidy that strikes me as offensive on grounds of both efficiency⁸⁸ and distribution.⁸⁹ Here too, however, it can be expected that under the proposed reformulation, with its emphasis on out-of-pocket losses, uninsured motorist insurers would inquire of applicants about the income levels of at least the principal driver of the insured vehicle, and would consider this information in the calculation of their premium schedules; in this way, the inappropriate cross-subsidy can be avoided. It is noteworthy that even current practices take income levels into account at least at the territorial level. In their aggregate, residents of Beverly Hills who are injured by negligent motorists incur larger income losses and run up larger doctors' bills than do injured persons who reside outside of Beverly Hills. Because territorial pricing practices give weight to the magnitude of claims as well as to their frequency, there is already a mark-up in uninsured motorist premiums that all in the Beverly Hills territory are required to pay. The inequality of income levels *among* people who live *within* the same territory is the inequality that insurance practices do not acknowledge—but that would be dealt with once individualized information is secured through the method suggested above.

While this essay has by now recommended a contraction of coverage for uninsured motorist, it has not yet explained how to work out that contraction in a way

88. See Priest, *A Theory of Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

89. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 96-99 (1986).

that complies with the strategy of acknowledging uninsured motorist as part of the status quo. In this regard, there are three distinct ways in which that status quo can be characterized. It might be said that public policy is committed to providing uninsured motorist coverage for all \$15,000 accidents; alternatively, it could be said that public policy is committed to providing insurance coverage for \$15,000 worth of injury; alternatively, the point may be that public policy is committed to requiring motorists to pay a minimum premium in order to protect themselves against the risk of injury at the hands of an insolvent defendant. Each of these depictions of the status quo raises its own possibility as to how uninsured motorist insurance should be reformulated. The three possibilities can be referred to as Reformulation A, Reformulation B, and Reformulation C. In explaining each of these reformulations, this essay will need to consider in at least moderate detail the mechanics on which each might rely. On the basis of that consideration, this essay will reject one of the reformulations as unworkable; the other two it will endorse as each in its own way appropriate.

As noted, existing plans could be read as expressing the idea that the plan should apply up to the point at which the victim suffers an injury that is valued by tort law at \$15,000. If this is the key idea, then uninsured motorist plans, in order to effectuate the contraction here recommended, could be reformulated so as to allow the victim to recover *only* for that portion of the \$15,000 of damages that entails the victim's own net monetary losses. In light of the premium data that have been arrayed above,⁹⁰ it can be assumed that the current annual cost of uninsured motorist coverage can be expressed as \$50. (This figure is on the low side for my own territory in Los Angeles, but may well be on the high side for most of the nation.) Under Reformulation A, the basic compensation function of uninsured motorist plans could be preserved while cutting the price of uninsured motorist coverage from an annual \$50 to a sum closer to \$15.⁹¹ This Reformulation would thus achieve a cost savings—a minor savings, perhaps, for the individual motorist, but a major savings for motorists in the aggregate.

Such a reformulation hence makes plenty of sense, at least in the abstract. On closer inspection, however, the reformulation would lead to administrative difficulties that are probably unacceptable. Assume that a victim suffers an injury that tort law might value at something like \$30,000; assume further that the net out-of-pocket losses attributable to this overall injury are in the vicinity of \$10,000. If the victim can recover from her own uninsured motorist carrier for only the net out-of-pocket portion of the "first" \$15,000 of the victim's injury, how would the law go about the process of identifying that "first" \$15,000 of harm and the size of its net out-of-pocket component? The "first" \$15,000 could refer to those elements of harm that occur first in some temporal or chronological sense. But if so, then the judge or arbitrator⁹²

90. See *supra* text accompanying note 39.

91. Fifteen dollars is thirty percent of \$50. Since uninsured motorist is an extra endorsement in a policy that is being written for independent reasons, my assumption is that the overhead uniquely contributed by uninsured motorist is low.

92. Uninsured motorist policies typically establish arbitration as the technique for resolving most of the disputes between insurer and insured. See 2 A. Weiss, *supra* note 11, at 139–46.

would need to work out a chronology for the victim's pain and suffering and to coordinate *that* chronology with the chronology of the medical bills and the income losses incurred by the victim. Yet such an enterprise would clearly seem to be expensive and unrewarding; the judgment-calls that it would require would likely be quite arbitrary. Given the awkwardness if not infeasibility of the procedure that Reformulation A would necessitate, that Reformulation should not be supported.

Reformulation B would characterize existing uninsured motorist programs as aiming to provide up to \$15,000 of compensation and would then endeavor to integrate *that* aim with the contraction of uninsured motorist coverage that I have identified. Under Reformulation B, if a motorist driving without insurance negligently inflicts injury, the victim could recover from his own uninsured motorist carrier for all of his net out-of-pocket losses—up to a maximum of \$15,000. Figuring out how Reformulation B would actually take effect requires some effort; in expending this effort, it is helpful to take up several hypotheticals. (1) Under existing uninsured motorist coverage, the victim of a \$15,000 accident, of which \$4,500 consists of net out-of-pocket losses, receives \$15,000; under Reformulation B, he would receive only \$4,500. (In these circumstances, Reformulation B leads to a result that is the same as the result that was suggested by Reformulation A.) (2) Currently, the victim who suffers a \$30,000 injury, of which \$10,000 is net out-of-pocket losses, recovers \$15,000 from her own insurance company. So long as her out-of-pocket losses are \$10,000, her recovery under my Reformulation B would be limited to \$10,000. (3) Under current uninsured motorist insurance, the victim of a \$70,000 injury recovers \$15,000 from his own insurer. Under Reformulation B, if this person's net out-of-pocket losses equal \$21,000, he would likewise receive a \$15,000 insurance payment. One feature of this latter outcome merits commentary. *In form*, Reformulation B appears to result in uninsured motorist plans' somehow "applying" to injuries that are more serious than those to which the plan in its existing form applies. *In fact*, however, the selective character of the compensation objectives of Reformulation B turn out to signify that the payouts to victims of serious accidents under Reformulation B would, in their amounts, considerably resemble the payouts to the same victims under the current program.

In order to render understandable one further attribute of Reformulation B, there is an additional feature of current uninsured motorist plans that needs to be explained. Hypothetical (4) concerns the victim who suffers a \$50,000 injury. Under current law, the victim receives a \$15,000 uninsured motorist award, while retaining a \$35,000 tort claim that she can bring against the negligent motorist, if the latter has any assets.⁹³ As noted, the uninsured motorist carrier has its own claim against that motorist, by way of subrogation.⁹⁴ Existing uninsured motorist plans include some arrangements for consolidating the claim of the victim and the claim of the insurer,

93. There is a complication here, for some courts honor provisions in uninsured motorist contracts that specify that the carrier's liability to the victim is reduced by the amount of any tort recovery that the victim receives from the negligent motorist. See 2 A. WISS, *supra* note 11, at 64–67. This issue is the cognate of the issue discussed in *supra* text accompanying note 88.

94. See *supra* text accompanying notes 81–82.

thereby reducing the likelihood of any undue duplication of litigation.⁹⁵ So long as the assets held by the motorist exceed \$50,000, then the combined claims of the victim and the insurance company can be enforced without difficulty. However: if the motorist's assets are less than \$50,000, the question arises as to the relative priority of the victim's \$35,000 tort claim and the carrier's \$15,000 subrogation claim.

In considering this question, states have reached somewhat diverging positions. The majority view, however, is that full tort compensation for the victim remains the primary goal of public policy, and that the victim's claim therefore deserves priority.⁹⁶ For example, if the negligent motorist has assets worth \$10,000, the victim secures these \$10,000, the carrier nothing. To establish priorities in this way seems plausible to me; accordingly, in the interest of not unnecessarily disturbing the status quo, I would retain this priority as an incident of Reformulation B. There is, perhaps, a need to make clear what the victim's supplemental tort would include. Under the current uninsured motorist program, the victim's claim against the negligent motorist is for the excess of damages over the first \$15,000 of damages; under Reformulation B, the victim's claim against that motorist would be for those portions of tort damages that relate to pain and suffering, and also those losses incurred by the victim for which he has received reimbursement from collateral sources.

Having clarified the status of the victim's claim against the negligent motorist under Reformulation B, I need to consider how that Reformulation would deal with hypothetical (5). In this hypothetical, the victim suffers a \$30,000 injury, \$9,000 of which relates to net economic loss; meanwhile, the negligent motorist is in fact covered by the \$15,000 liability policy that is required or semi-required by law. Under the current program, this victim, by hypothesis, does not have an uninsured motorist claim: the defendant *is* minimally insured. However, since that insurance provides only a \$15,000 award, the current plaintiff who seeks the full \$30,000 in compensation must sue the defendant personally for the \$15,000 excess, hoping that the defendant has the assets that would satisfy a tort judgment. Under Reformulation B, the uninsured motorist program might be said to "apply" to the full \$30,000 accident: it would compensate for all his net out-of-pocket losses, up to \$15,000, that are included within that \$30,000. But something seems wrong with this statement: for once again, the negligent motorist *is* covered by an insurance policy that meets the legal minimum.

There certainly is a problem here, but the problem is one that proves capable of solution. All that is needed is for the program's statute to stipulate that payments coming from a liability insurance policy should be interpreted as payments that compensate the plaintiff for his net economic losses—until the point is reached at which those losses have been fully reimbursed. Given this stipulation, if the negligent motorist does have a \$15,000 liability insurance policy, then the victim does receive full compensation for his net economic losses—and Reformulation B does *not* come into play. Hypothetical (6) can provide further clarification. In this hypothetical—

95. On the strategic complexities in California, see 1 P. EISLER, *supra* note 11, at 17–12 to 17–17.

96. See 2 A. WISS, *supra* note 11, at 84–87.

which is an expansion of hypothetical (3)—the plaintiff again suffers a \$70,000 injury that includes \$21,000 of net economic losses, while the negligent motorist is now covered by a \$15,000 policy. Because the plaintiff receives liability insurance payments for the first \$15,000 of the net economic loss, he is without rights against his own insurer for the remaining \$6,000.

Let me now review the hypotheticals that might arise under Reformulation B. This Reformulation would strongly reduce the program's payouts in a large number of small-injury cases (hypothetical 1); it would moderately reduce payouts in medium-injury cases (hypotheticals 2 and 5); in a smaller number of larger-injury cases it would preserve the current program's payouts (hypotheticals 3 and 6); in no case would the payout under the Reformulation exceed that provided by the current program. In the aggregate, then, the Reformulation would significantly decrease the program's outlays. To a corresponding extent, it would reduce the premiums that insurance companies charge. To be sure, the benefits available under Reformulation B would be broader than those provided by Reformulation A; therefore, the reduction in premiums under B would not be as sharp as the reduction that would be effected by A. To illustrate, under Reformulation B, the premium for uninsured motorist coverage might decline from \$50 to \$30.

It might be quite reasonable, however, to adopt the position that *any* such decline is inappropriate. For quite possibly, existing uninsured motorist plans can be interpreted as resting on a public-policy judgment that motorists should be required (or strongly encouraged) to pay something like \$50 per year in order to protect themselves against the risk of being injured by a negligent motorist whose insurance and assets are inadequate to cover his liability.⁹⁷ If it is this \$50 annual premium that should be preserved as the essence of the status quo, then the *contraction* of the program so as to cover only net out-of-pocket losses could be combined with an *expansion* of the program to cover net out-of-pocket losses up to perhaps a \$50,000 level. Call this Reformulation C; hypotheticals (7) and (8) can provide it with clarification. Hypothetical (7) considers the victim of an uninsured motorist who suffers a \$170,000 injury, of which \$50,000 consists of net economic losses. Under Reformulation C the victim recovers \$50,000. But the statement of this result leads directly to hypothetical (8). Assume that the victim suffers a \$170,000 injury on account of the negligence of a motorist who *does* have the \$15,000 liability insurance policy that is required by law. Under Reformulation C, the uninsured motorist carrier would be responsible for the difference between \$15,000 and \$50,000. Reformulation C would in fact do what Reformulation B merely flirted with doing: it would include protection against "underinsurance"⁹⁸ as well as "uninsurance." However, this is not, in and of itself, a drastic innovation: in a number of states, auto insurers have begun offering—as an option to the \$15,000/\$30,000 uninsured motorist requirement—uninsured-*and*-underinsured motorist coverage at levels of

97. This, of course, is a California figure. In a compulsory insurance state, the amount would be much lower.

98. "Underinsurance" here means insurance that is less than the victim's loss. Not surprisingly, insurance companies are unwilling to sell insurance policies for amounts that are less than the amount that motorists are required (or semi-required) by state law to buy.

\$30,000/\$50,000 or higher.⁹⁹ With Reformulation C (as with Reformulation B) one needs to know how the program's payments would be related to the negligent motorist's liability insurance, and also that motorist's personal liability. In this regard, return to hypothetical (8), which concerns the victim who suffers a \$170,000 tort injury, of which \$50,000 is net economic losses. As with Reformulation B, the key to synchronization is to stipulate by statute that the plaintiff's collection from the defendant's liability insurer is primarily for net economic losses. If, therefore, the defendant does have the legal minimum of \$15,000 insurance, then the victim would have a \$35,000 claim against his own uninsured-and-underinsured motorist carrier. If the negligent motorist has assets in addition to his insurance policy, he would be subject to a \$35,000 subrogation claim asserted by the first-party carrier and a \$120,000 residual tort claim asserted by the original victim. If the defendant does have insurance above the legal minimum up to (say) the \$50,000 level, then the plaintiff, in collecting the full amount of that insurance, would be without any claim against his own uninsured-and-underinsured first-party carrier; still, the plaintiff would retain his personal \$100,000 action against the negligent defendant. Accordingly, that defendant's personal liability is the same as it would be in the absence of the Reformulation. Moreover, so long as the insurer's subrogation claim and the victim's personal claim can be appropriately consolidated,¹⁰⁰ Reformulation C would not occasion any actual increase in levels of litigation.

V. CONCLUSIONS AND IMPLICATIONS

In my presentation at the AALS Mini-Workshop in January, I advanced Reformulations A and C as the relevant alternatives. I had not yet identified Reformulation B; moreover, because I had not yet considered its mechanics, I did not then realize why Reformulation A would be unsatisfactory. Now that I have *figured out* Reformulation B and *ruled out* Reformulation A, I can present B and C as the appropriate alternatives. My hope is that a near consensus of scholars would agree that the adoption of one or the other of these alternatives would be a desirable law reform—an improvement upon the status quo. For those scholars who favor the basic concept of uninsured motorist, the adoption of either B or C would make a good program better; for those who oppose that basic concept, the adoption of either would make a bad program less bad. For scholars who adhere to a Calabresian position,¹⁰¹ the amendment would convert a dumb program into a program that is intelligent, or at least plausibly defensible. As far as the choice between Reformulations B and C is concerned, those who are generally enthusiastic about compensation programs can be expected to favor the more ambitious C over the more modest B; those who are inclined to be cautious about compensation programs would probably prefer the modesty of B to the ambitiousness of C. My own preference lies with C, although for a somewhat special reason. As noted, I would like to make sure that insurance

99. See I A. WISS, *supra* note 11, at 305–308, 321–23.

100. See *supra* text accompanying note 95.

101. See *supra* text accompanying note 84.

companies establish uninsured motorist premiums in a way that takes into account the income levels of insureds and the collateral sources available to insureds.¹⁰² The larger the liabilities that insurance companies can expect to bear for net economic losses under uninsured motorist, the more willing they will be to gather the information that would enable them to establish such premium differentials. Since Reformulation C does a better job than Reformulation B in increasing the economic-loss stakes in uninsured motorist plans, it is Reformulation C that ends up with my support.

In any event, this essay has by now provided discussions of uninsured motorist plans generally, the deficiencies in those plans, and the relevant alternatives. Those discussions have aimed at being succinct and self-sufficient. With the hope that I have at least come close to achieving my aims,¹⁰³ I will make no effort here to restate or summarize my analysis. This Conclusion does need to explain, however, what happens when uninsured motorist programs operate within jurisdictions that have legislatively adopted auto no-fault compensation plans. More than twenty states have enacted auto no-fault programs (although often in compromised forms that dishearten the supporters of the no-fault idea).¹⁰⁴ No-fault itself entails a compromise between the concept of compensation and the ordinary principles of tort. Under no-fault, the victim recovers for his economic losses up to some "cap;" for economic losses above that cap and for all pain-and-suffering damages in accidents that exceed the no-fault "threshold," the victim can assert whatever traditional tort claims the circumstances of the specific accident suggest.¹⁰⁵ Given the way in which no-fault guarantees compensation for the victim up to the cap, it might be expected that no-fault states would see no need for an actual uninsured motorist program.¹⁰⁶ As it happens, Michigan, in the course of adopting a strong version of no-fault, decided to dispense with uninsured motorist.¹⁰⁷ However, every other jurisdiction that has adopted no-fault has retained its uninsured motorist plan¹⁰⁸ (thereby documenting the durability of uninsured motorist). In no-fault states, tort claims cover (as indicated) economic losses above the cap and pain-and-suffering damages in accidents that surpass the threshold. Given the relative levels at which typical caps and thresholds have been set, in no-fault jurisdictions pain-and-suffering claims almost certainly comprise an even greater percentage of tort recoveries than they do in traditional tort

102. See *supra* text accompanying notes 88–89.

103. I know I have not fully achieved my aims, since there are certain complicating factors that I have not yet taken into account. The most important of these concerns the timing of litigation. My explanations of how the various reformulations would work have tended to assume that the court (or arbitrator) has complete information as to the total of the plaintiff's tort damages and his out-of-pocket losses. My explanations may need to be reconsidered, therefore, if it is recognized that the claimant may want to receive his uninsured motorist award at a time when these final numbers are not yet available.

104. See O'Connell & Joost, *supra* note 35, at 62–63.

105. The various caps and thresholds are set forth in U.S. Department of Transportation, *supra* note 23, at 23–40.

106. See R. KEETON, *INSURANCE LAW—BASIC TEXT* 245 (1971) (in no-fault era, uninsured motorist program "seems destined for major modification").

107. See 1 A. WIDISS, *supra* note 11, at 17 n.57.

108. See *id.* at 17.

jurisdictions.¹⁰⁹ The adoption of no-fault hence serves to aggravate one of the basic deficiencies in uninsured motorist that my essay has outlined. Because of this, in no-fault jurisdictions that preserve uninsured motorist, my proposed reformulations of uninsured motorist have a special urgency.

At the very least, the coexistence of no-fault and uninsured motorist within a given state serves to highlight or dramatize certain policy considerations relating to uninsured motorist plans. Obversely, this essay's discussion of uninsured motorist plans may in a number of ways cast light on the policy considerations surrounding no-fault itself: that is, a comparison of uninsured motorist and no-fault plans may enable us to better understand no-fault. No-fault *resembles* uninsured motorist in that each relies on first-party insurance as a response to the problem of highway injuries. However, no-fault *differs* from uninsured motorist in its willingness to supersede tort liability. Subrogation is the strong majority rule in uninsured motorist legal arrangements;¹¹⁰ yet only a handful of no-fault jurisdictions afford the no-fault insurer a subrogation claim against the liability insurer of the negligent motorist.¹¹¹ Given the model provided by uninsured motorist plans, the observer can wonder whether the possibility of subrogation deserves more serious consideration within no-fault—as a way of preserving (although at considerable administrative cost)¹¹² whatever the benefits might be of a regime of tort liability.

No-fault is also unlike uninsured motorist plans in that in most states no-fault is entirely compulsory. By contrast, in a majority of states uninsured motorist plans include an ultimate feature of voluntariness.¹¹³ Proponents of no-fault paint a glowing picture of victim or consumer benefits under no-fault.¹¹⁴ Yet the very portrayal of those benefits leads the observer to ask why the choice between tort and no-fault should not be left to the volition of the individual motorist.¹¹⁵ Indeed, the possibility of voluntary no-fault arrangements has been considered by a number of no-fault sympathizers, including Calabresi in 1971,¹¹⁶ Keeton and O'Connell in 1971,¹¹⁷ and O'Connell again in 1986.¹¹⁸ Voluntary no-fault would be easy enough to administer in auto accidents involving two motorists each of whom has chosen no-fault. (Each motorist would recover from her own insurer.) Voluntary no-fault is also easy to understand in its application to two motorists each of whom has rejected the no-fault

109. An "add-on" no-fault regime preserves *all* pain-and-suffering claims. See *infra* text accompanying note 122. In these states, the tilt in tort awards in favor of pain and suffering is presumably even more pronounced.

110. See *supra* text accompanying note 81. Of course, the insolvency of most uninsured motorists reduces the operational significance of subrogation within uninsured motorist plans.

111. See U.S. Department of Transportation, *supra* note 23, at 130–32.

112. Note that litigation costs would be much less under subrogation than in a pure tort regime, since insurance companies could horse-trade large numbers of claims.

113. See *supra* text accompanying note 30.

114. U.S. Department of Transportation, *supra* note 23, at 3–6.

115. See, e.g., Epstein, *Automobile No-Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769, 789–90 (1980). The Kentucky no-fault program is optional. See U.S. Department of Transportation, *supra* note 23, at 32. As of yet, there have not been any careful reviews of the Kentucky statute—let alone any accounts of the actual Kentucky experience.

116. Calabresi, *The New York Plan: A Free Choice Modification*, 71 COLUM. L. REV. 267 (1971).

117. Keeton & O'Connell, *Alternative Paths Toward NonFault Automobile Insurance*, 71 COLUM. L. REV. 241 (1971).

118. See O'Connell & Joost, *supra* note 35.

option. (These motorists' compensation claims would remain determined by ordinary tort liability rules.) The very difficult problem lies in working out the meaning of voluntary no-fault when a specific accident involves one motorist who has elected no-fault and another who has chosen to remain with tort. This problem has been keenly appreciated by Calabresi, Keeton, and O'Connell, all of whom have attempted to figure out solutions.¹¹⁹ Any such solution must, at the least, allocate costs between tort motorists and no-fault motorists in a way that both complies with considerations of fairness and avoids exerting any undue bias on the choice that motorists would be expected to make between tort and no-fault. Interestingly enough, O'Connell's most recent suggestion is to rely on a major expansion of uninsured motorist coverage as a way of building the appropriate "connector" between tort motorists and no-fault motorists.¹²⁰ To be sure, even if such a connector can be constructed, the case on behalf of voluntary no-fault would not be complete. For, as tort proponents could argue, there may be fairness virtues and incentive advantages in imposing liability on negligent motorists; any system that allows motorists, even in an *ex ante* way, to opt out of the regime of tort liability is thus not free from controversy.¹²¹

In this regard, however, it can be noted that in several states no-fault is a mere "add-on" that displaces tort only in a limited way. (The no-fault payment that the victim receives serves as an offset against any later tort liability claim.¹²²) Given this limited impact on tort of add-on no-fault, the question arises whether such a no-fault scheme could be rendered voluntary with the individual motorist. Auto insurers already offer limited "medical payments" coverage as an option; the observer wonders why these insurers have not been willing to offer this coverage with higher policy limits, and why they do not seem willing to offer income interruption coverage as well.¹²³ Lurking in the background here may well be problems of proper insurance pricing and adverse selection. As it happens, in four states—Arkansas, South Carolina, Texas, and Washington—add-on no-fault is offered to motorists on an optional basis: the number of motorists electing this option is 28, 74, 59, and 66 percent, respectively.¹²⁴ For public policy purposes, there is a real need for empirical studies of this range of election rates,¹²⁵ of the characteristics of those motorists who do and do not choose the no-fault option, and of other aspects of the dynamics of add-on no-fault in its voluntary forms.

One further feature of my discussion of the uninsured-and-underinsured motorist problem can bring this essay towards its close. Here my point is that this problem is somewhat peculiar to the United States. In countries such as England and Australia,

119. Calabresi, *supra* note 116, at 268–71; Keeton & O'Connell, *supra* note 117, at 257–58; O'Connell & Joost, *supra* note 35, at 78.

120. See O'Connell & Joost, *supra* note 35, at 78–80.

121. For practical problems with optional no-fault, see the somewhat garbled account in U.S. Department of Transportation, *supra* note 23, at 124.

122. See *id.* at 41. In a few add-on states, the no-fault insurer has a subrogation right against the negligent motorist. *Id.* at 132.

123. I have been told that such coverage is offered by auto insurers in Canada.

124. See *id.* at 42, 47–49.

125. South Carolina, with the highest acceptance rate, has the highest no-fault premiums, yet the lowest no-fault benefit levels! *Id.*

liability insurance is mandatory for motorists—and this mandate is enforced in ways that seemingly permit no avoidance. In addition, the liability insurance that motorists are required to buy is without policy limits—it is written for unlimited amounts. By contrast, in this country the liability insurance that is mandatory or semi-mandatory is merely in the 15/30 range.¹²⁶ For that matter, even the motorist who wishes to purchase additional insurance finds that no insurance company will provide unlimited coverage; indeed, most insurers are unwilling to go higher than 100/300. American studies have repeatedly shown that the victims of serious or catastrophic auto accidents are compensated less adequately by the tort system than the victims of minor or more moderate accidents.¹²⁷ Tort scholars have tended to assume that these findings suggest some peculiar perversity in the tort system—perhaps the ability of minor-accident victims to file claims that lead to disproportionate nuisance-value settlements.¹²⁸ Yet this latter explanation I have always found curious: for the costs and uncertainties of litigation are symmetrical for plaintiffs and defendants—and it is the defendant's auto insurance company which, as a repeat tort player, has the strongest interest in developing a reputation for toughness in the claims settlement process. From my angle, the relative undercompensation of the victims of serious injury is a result that flows inevitably from the very low amount of insurance coverage that the law requires (and the relatively low amount of coverage that liability insurers are even willing to write).¹²⁹

To make this point need not entail, however, any real criticism of American insurance practices. For there are major differences between English and American civil procedure that bear on the feasibility of unlimited liability insurance. In England, tort trials are by judge rather than by jury. Moreover, English judges are few in number; they are recruited pursuant to a process that leads to their having fairly uniform credentials and outlooks, and they are centrally headquartered in a way that enables each to keep track of what the others are doing. Given the process of trial-by-judge and the attributes of the judges in question, tort trials in England generate verdicts that are substantially consistent from case to case and (by American standards) very moderate in their amounts. In these English circumstances, insurance companies can write uncapped policies without at the same time exposing themselves to liabilities that may be either unpredictable or open-ended. It is *not* my purpose here to argue that America should jettison its commitment to trial-by-jury or reconstitute the system by which judges are appointed. However, I *do* want us to acknowledge that the American procedures to which we evidently are committed give rise to problems that other countries, with their own legal cultures, are able to avoid.

126. In many states, however, the real-dollar protection afforded by compulsory insurance has gone down sharply over time. In New York, for example, despite inflation, mandatory insurance levels have remained at 10/20 since the early 1960's. (A revision is now underway in the state legislature. See N.Y. Times, June 3, 1987, at 26, col. 3 (nat'l ed.)).

127. See R. KEETON & J. O'CONNELL, *supra* note 70, at 2.

128. See *id.*

129. Conceivably, low policy limits could be justified as a way of controlling the extent to which liability insurance reduces motorists' incentives to drive nonnegligently. For a number of reasons that need not be spelled out here, I find this rationale very hard to credit.

But I should return now from the pretensions of comparative observations to my narrow topic of uninsured motorist insurance. I have recommended in this essay that uninsured motorist programs be legislatively reformed so as to provide more real insurance per premium dollar. Even if my recommendation proves insufficiently potent to mobilize state legislatures, I hope that my analysis has been sound enough to persuade many readers in thirty-two states¹³⁰ to engage in a simple exercise in self-reform: to decline to renew their own uninsured motorist coverage.

130. *See supra* text accompanying note 30.